1992

Darrell F. Abel v. Industrial Commission of Utah, West Jordan Care Center, the Workers Compensation Fund of Utah, and the Employers' Reinsurance Fund : Brief of Petitioner

Utah Court of Appeals

UTAH COURT OF APPEALS

DOCKET NO. 920262CA

DARRELL F. ABEL, Petitioner, vs. INDUSTRIAL COMMISSION OF UTAH, WEST JORDAN CARE CENTER, the WORKERS COMPENSATION FUND OF UTAH, and the EMPLOYERS' REINSURANCE FUND, Respondents.	Case No. 920262-CA Priority No. 7

B R I E F O F P E T I T I O N E R

PETITION FOR REVIEW OF

DENIAL OF PETITIONER'S MOTION FOR REVIEW OF

ORDER OF THE INDUSTRIAL COMMISSION OF UTAH

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This is a Petition for Review of the Industrial Commission's March 27, 1992 Order Denying Petitioner's Motion for Review alleging entitlement to permanent, total disability workers' compensation benefits sustained as a result of an industrial accident. A Petition for Review of that Order was timely filed with this Court on April 24, 1992.

This Court has jurisdiction to hear this Petition for Review pursuant to Utah Code Annotated, Sections 35-1-82.53(2) (1988), 35-1-86 (1988), 63-46b-16 (1988), and 78-2a-3(2)(a) (1988); and Rule 14 of the Utah Rules of Appellate Procedure.

STATEMENT OF THE ISSUE(S)/STANDARD OF APPELLATE REVIEW

There are three substantial issues presented for review:

(1) whether an injured worker who is injured at work during a period of time when he is attempting to return to substantial, gainful employment is entitled to recieve workers compensation benefits occasioned by his industrial injury;

(2) whether an injured worker so injured is entitled to permanent, total disability compensation where he was in fact gainfully employed at the time of his industrial injury, and is unable to return or meaningfully attempt to return to work following his industrial injury; and,

(3) whether an injured worker's ability to work in gainful employment at the time of his industrial injury demonstrates as a matter of law that he is not permanently and totally disabled at

the time of his industrial injury.

The standard of appellate review which is to be applied to the resolution of the above issues is one involving "correction of error", since they involve questions of law, and no deference to the agency's view of the law is required. Utah Administrative Procedures Act, Utah Code Annotated, Section 63-46b-16(4) (d) (1988). Mor-Flo Industries v. Board of Review, 817 P.2d 328 (Utah 1991). Morton International, Inc. v. Auditing Division of the Utah State Tax Commission, 814 P.2d 581 (Utah 1991).

Furthermore, in reviewing the proceedings below and the scope of the Utah Workers Compensation Act, it is important to recognize that the Act is to be liberally construed and any doubt as to compensation is to be resolved in favor of the Petitioner. State Tax Commission v. Industrial Commission, 685 P.2d 1051, 1053 (Utah 1984). McPhie v. Industrial Commission, 567 P.2d 153, 155 (Utah 1977).

DETERMINATIVE STATUTE/RULE

Utah Code Annotated, Section 35-1-67 (5)(b) (1991) is the determinative statute in this case. Industrial Commission Rule R568-1-17 of the Utah Administrative Rules is also applicable. They are each set forth in full in the Addendum hereto as Exhibit A.

STATEMENT OF THE CASE

Nature of the Case

Mr. Abel seeks review of the Industrial Commission Order denying his Motion for Review wherein he alleged entitlement to workers' compensation benefits occasioned by his industrial accident.

Course of Proceedings

On November 21, 1990 Petitioner filed an Application for permanent, total disability benefits alleging that as the result of his March 22, 1989 industrial injury he was no longer able to work. (R. at 5). Respondents alleged that Mr. Abel's industrial accident did not cause his permanent, total disability status. (R. at 120). A formal hearing was held before an Administrative Law Judge on March 12, 1991. (R. at 12).

Disposition Below

On October 3, 1991, The Administrative Law Judge found that there was no causal connection between the industrial accident and the Petitioner's permanent, total disability status. His claim for permanent, total disability benefits was dismissed with prejudiced. (R. at 53-65, copy attached to Addendum as Exhibit B).

Mr. Abel filed a Motion for Review with the Industrial Commission which was subsequently denied on March 27, 1992. (R. at 119-122, copy attached to Addendum as Exhibit C). He challenges that final agency action in this Petition for Review.

Statement of the Facts

The relevant facts in this matter are not in dispute.

On March 22, 1989, the Petitioner experienced an industrial injury to his lower back while employed by West Jordan Care Center.

(R. at 57). Five years previously, Mr. Abel had been found totally disabled by the Social Security Administration and was awarded federal disability payments. (R. at 145). Notwithstanding his Social Security's determination of his disability, he reentered the work force and had been working 32 hours a week for several weeks prior to his industrial injury. (R. at 32). He was unable to returned to work after his industrial injury (R. at 40, 41), and was found to be unsuitable for vocational rehabilitation due to his age (over 57 years old); education (into the 11th grade); work history (punch press, dye set-up and truck driver); and the severity of his overall medical condition. (R. at 60).

The Medical Panel report, which was adopted by the Administrative Law Judge, found that as a direct result of the industrial accident, Petitioner sustained a 5% whole person impairment. His prior impairments totaled 75%, resulting in a total combined whole person impairment of 80%. (R. at 38-47).

All parties agree that the Petitioner is presently permanently and totally disabled. (R. at 61). The Utah Industrial Commission, however, found that Mr. Abel's "industrial accident was not a significant cause of his permanent total disability" [emphasis added], and that he was "basically unemployable on March 22, 1989 by virtue of his preexisting disabilities." [emphasis added] (R. at 120). Petitioner was awarded benefits for only the 5% whole person low back impairment. (R. at 64, 121).

SUMMARY OF ARGUMENT(S)

Mr. Abel sustained a compensable industrial injury on March 22, 1989, while in the employ of Respondent West Jordan Care Center. Although he was at that time receiving Social Security total disability compensation, Mr. Abel re-entered the work force and was gainfully employed. He had been working for several weeks prior to his injury. The doctors who examined and treated Mr. Abel found that he had sustained an industrial injury and that it was responsible, at least in part, for his resulting permanent, total disability status. The Medical Panel appointed by the Industrial Commission concurred. Mr. Abel was unable to return to work after the accident, and was not a suitable candidate for vocational rehabilitation.

The fact that one has been found by the Social Security Administration, under their statutes, rules and definitions, to be "totally disabled" does not mean that one can not still engage in gainful employment. In fact, the Social Security Administration regulations allow and encourage a totally disabled person to return to work, and if such return is successful and sustained, the person is then removed from total disabled status. The receipt of federal disability benefits does not as a matter of law preclude a worker who subsequently returns to work and is there injured and completely disabled from also receiving state workers compensation benefits.

This Court should summarily reverse the Industrial Commission's determination that Petitioner's industrial injury was not the precipitating cause of his "permanent, total disability"

status.

ARGUMENT

I

THE WORKERS' COMPENSATION ACT IS TO BE APPLIED LIBERALLY IN FAVOR OF AWARDING BENEFITS AND ALL DOUBTS AS TO COVERAGE ARE TO BE RESOLVED IN FAVOR OF THE INJURED WORKER.

Few principles of workers' compensation law are as well established in this State as that workers' compensation disability claims are to be liberally construed in favor of awarding benefits, and any doubts raised from the evidence are to be resolved in favor of the claim. Utah Courts have consistently reiterated this principle from 1919 to the present. Heaton v. Second Injury Fund, 796 P.2d 676 (Utah 1990); State Tax Commission v. Industrial Commission, supra.,; J & W Janitorial Co. v. Industrial Commission, 661 P.2d 949 (Utah 1983); Prows v. Industrial Commission, 610 P.2d 1362 (Utah 1980); McPhie v. Industrial Commission, supra.; Baker v. Industrial Commission, 405 P.2d 613 (Utah 1965); Askrew v. Industrial Commission, 391 P.2d 302 (Utah 1964); M & K Corp. v. Industrial Commission, 189 P.2d 132 (Utah 1948); and Chandler v. Industrial Commission, 184 P. 1020 (Utah 1919).

The Utah Supreme Court in Chandler, supra at 1021-1022, discussed the proper construction of the Workers' Compensation Act and the underlying purposes of the Act, and stated as follows:

> We are also reminded that our statute requires that the statues of this state are to be 'liberally construed with a view to effect the objects of the statutes and to promote justice.'
>
> * * * * * *

> In this connection it must be remembered that the compensation provided for in the act is in no sense to be considered as damages for the injured employee or to his dependents in case death supervenes. The right to compensation arises out of the relation existing between employer and employee, and that the injury arises out of [or] in the course of the employment. Under such an act the costs and expenses of conducting the business or enterprise, including compensation for injuries to 'employees or other casualties, must be taxed to the business. The theory of the Compensation Act is that the whole cost and expense of conducting the business as aforesaid is added to the cost of the articles that are produced and sold, and hence, in the long run, such costs and expenses are borne by the public; that is, by the consumers of the articles produced. The purpose of such an act, therefore, is to protect the employee and those dependent upon him, and in case of his serious injury or death to provide adequate means for the support of those dependent upon him. In view, therefore, that in case of total disability or death of the employee his dependents might become the objects of public charity, such a calamity is avoided by requiring the business or enterprise to provide for such dependents, with the right of the employer to add the amount that is paid out to the cost of producing and selling the product of such business or enterprise. The beneficent purpose of such acts are therefore apparent to all, and for that reason, if for no other, should receive a very liberal construction in favor of the injured employee. We are all united upon the proposition that in view of the purposes of such acts, in case there is any doubt respecting the right to compensation, such doubt should be resolved in favor of the employee or his dependents as the case may be. (Emphasis added).

In analyzing the record below, this Court should keep this fundamental precept of workers compensation law in mind. In doing so, it becomes abundantly clear that the final agency action must be reversed and remanded with instructions to enter an award granting permanent, total disability compensation benefits to Mr. Abel.

II

THE INDUSTRIAL COMMISSION IMPROPERLY FAILED TO AWARD PETITIONER PERMANENT, TOTAL DISABILITY COMPENSATION DUE TO PETITIONER'S INJURIES WHICH WERE OCCASIONED BY HIS INDUSTRIAL ACCIDENT.

The basis for the Industrial Commission's Order Denying Motion for Review was their conclusion that "We determine that since Applicant had already been determined to be permanently and totally disabled, his current injury could not and was not, a significant cause of his permanent total disability." (R. at 120). In reaching that conclusion the Industrial Commission adopted the findings of the Administrative Law Judge that:

> ...The applicant's current unemployable status is not the result of the March 22, 1989 accident. Although the March 22, 1989 industrial accident may have minimally contributed to the applicant's already substantial disabilities, that accident did not cause him to go from employable to unemployable. The applicant was basically unemployable on March 22, 1989. Although he was able to work on a very limited basis (part time) at that time, for very minimal wages ($3.42/hour), he was not capable of gainful employment due to his significant pre-existing disabilities. The applicant did not enter the job market, only to be taken out again by the industrial accident. Even the applicant stated that he took the job at West Jordan Care Center, not as an attempt to return to gainful employment, but rather as a way of becoming more useful and active. ...the fact remains that he was out of the job market when he began work there, he was incapable of gainful employment at that time, and he was permanently totally disabled as is evidenced by his 1985 Social Security Disability award. The March 22, 1989 industrial accident did not cause the permanent total disability. The disability was evident even before the applicant began work with the Care Center. (R. at 63).

It is difficult to determine how the Administrative Law Judge and the Industrial Commission reached the conclusion that the Social Security determination was conclusive and that Mr. Abel was not engaged in gainful employment. It should be noted that under

Social Security Rules and Regulations, one can be totally disabled and still be allowed to engage in gainful employment and earn up to $740.00 per month. 20 C.F.R. 404.430. That policy is further recognized by Social Security's "Unsuccessful Work Attempt" (UWA) policy contained in Social Security Ruling No. 84-25. (R. at 16-19).

In fact, the 1988 statutory modification to the Utah permanent, total disability statute specifically adopted the federal sequential evaluation process, which such process includes a review of an injured worker's ability to return to substantial, gainful employment with due acknowledgment being given for attempted return to work efforts which prove to be unsuccessful. This is particularly true and significant where the unsuccessful work attempt is directly caused by a significant industrial injury, as here, which effectively precludes the completion of an otherwise successful return to work effort. Stated another way, but for the industrial injury, the Petitioner may have been able to successfully return to work.

The Worker's Compensation Act should not be construed in such a way as to discourage seriously injured workers from attempting to return to work as a matter of public policy. In addition, such an individual should not be denied the rights, benefits and protection of Worker's Compensation insurance coverage which all employees enjoy for the simple reason that they have significant prior impairments. Failure to accept this reasoning raises serious questions concerning possible violations of the federal and state

guarantees of equal protection of the law.

Both the Administrative Law Judge and the Industrial Commission engaged in improper fact finding. The actual Findings of Fact portion of the Order as they relate to the March 22, 1989 industrial injury and it's relation to Mr. Abel's permanent, total disability status are grossly inadequate and do not meet recent legal requirements. The statements that Mr. Abel was out of the job market and not gainfully employed are bald assertions, with no reference to the evidence presented. Such summary conclusions do not constitute proper fact-finding. In the recent case of Adams v. Board of Review, 821 P.2d 1 (Utah App. 1991), the Court stated as follows:

> While the purported 'Findings of Fact' written by the A.L.J. contain an informative summary of the evidence presented, such a rehearsal of contradictory evidence does not constitute findings of fact. In order for a finding to truly constitute a 'finding of fact,' it must indicate what the A.L.J. determines in fact occurred.... The evidence did not merely indicate two possible versions of a fact whereby we could conclude that the denial of benefits necessarily indicates that the Commission accepted one version over another. The evidence shows several possible configurations and degrees of injury and/or disease, if any, and the causes, if any, thereby creating a matrix of possible factual findings. A mere summary of the conflicting evidence in this case therefore does not give a clear indication of the A.L.J.'s or the Commission's view as to what in fact occurred. Since we cannot even determine why the Commission found there was no causation shown, we clearly cannot assume that the Commission actually made any of the possible subsidiary findings. The findings are therefore inadequate. Id. at 20.

The Findings made by the Administrative Law Judge and adopted by the Industrial Commission are deficient in that they fail to address in detail the issue of medical causation.

Although none of the parties, including the Administrative Law Judge, dispute that Petitioner is presently permanently and totally disabled, the Industrial Commission does not address the Petitioner's inability to perform even the limited work he was doing before his industrial injury. The Administrative Law Judge spends a great deal of time summarizing and discussing Petitioner's prior medical problems, but does not make concise findings as to Petitioner's current medical condition, the causes for it and the ability of the Petitioner to perform any work in light of the industrial injury. That failure manifests itself here in inadequate findings.

The Utah Court of Appeals has recently informed this Commission that:

> In order for us to meaningfully review the findings of the Commission, the findings must be 'sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached.' Action v. Deliran, 737 P.2d 996 999 (Utah 1987) (quoting Rucker v. Dalton, 598 P.2d 1336 (Utah 1979))...[T]he failure of an agency to make adequate findings of fact on material issues renders its findings 'arbitrary and capricious' unless the evidence is 'clear, uncontroverted and capable of only one conclusion.' Id. (quoting Kinkella v. Baugh, 660 P.2d 233, 236 (Utah 1983)).

Nyrehn v. Industrial Commission, 800 P.2d 330, 335 (Utah App. 1990), cert. denied, 815 P.2d 241 (Utah 1991).

The Industrial Commission's as well as the Administrative Law Judge's purported Findings of Fact, Conclusions of Law and Order should at a minimum be vacated and remanded with instructions to enter a new Order with detailed and subsidiary facts to disclose the steps by which the ultimate conclusion was reached. Failure to

do so, denies Petitioner the ability to marshal the evidence in support of the findings and show that it is not substantial. Grace Drilling Co. v. Board of Review, 776 P.2d 63, 67-68 (Utah App. 1989).

It is important to note that the Petitioner is not seeking to recover twice for the same disability; rather he only seeks Utah Worker's Compensation benefits for the incremental loss of the minimal wage he was able and in fact was earning at the time of his industrial injury. An award of partial disability compensation does not fully compensate him for his total inability to work due to the final 5% impairment he sustained in his industrial injury.

The March 22, 1989 industrial injury was the "final straw" which rendered Petitioner incapable of performing any gainful work, including, significantly, that which he was performing at the time of his industrial accident. Prior to that time and despite his other impairments, which had led Social Security to conclude that he was totally disable under its guidelines, he was nevertheless capable of some gainful employment, although not full time work, at the time of the industrial injury as demonstrated by the fact that he had been working for several weeks and was performing his duties in an acceptable manner. The fact that he was able to work is evidence that he was not previously "permanently, totally disabled" for purposes of Utah's Workman's Compensation benefits. Marshall v. Industrial Commission, 681 P.2d 208 (Utah 1984); Entwistle v. Wilkins, 626 P.2d 495 (Utah 1981); and Nuzum v. Roosendahl Constr. & Mining Corp., 565 P.2d 1144 (Utah 1977).

Utah Code Annotated, Section 35-1-67(5)(b) (1988), in fact, provides in significant part that permanent, total disability compensation "...ends with the death of the employee or when the employee is capable of returning to regular, steady work". (emphasis added). The Petitioner's industrial injury precluded him from reaching the point where his work effort could be considered "regular, steady work", but he was when he was injured attempting to reach that possible plateau. The Utah Workers Compensation Act should not be interpreted as discouraging return-to-work efforts similar to Mr. Abel's.

The Administrative Law Judge's finding that the Petitioner "was out of the job market when he began work (at the West Jordan Care Center)" was incorrect because he was working at the time. The fact that he was capable of gainful employment was demonstrated by the successful discharge of his job requirements at the time of the industrial injury. The Administrative Law Judge erred as a matter of law when she held that part time work for $3.42 per hour is not gainful employment - it is work and that is all the Act requires. The motivation for working need not be exclusively economic. One who earns a wage at a job taken primarily in order to be "useful and active", is still entitled to permanent, total disability benefits, if injured on the job.

To deny permanent, total disability benefits in this limited, minimal benefits claim would be contrary to the Utah Worker's Compensation Act's policy of encouraging injured workers to return to work. As such, it contravenes basic public policy.

In addition, the lesser standard of entitlement, referred to in the legal literature as the "odd lot" doctrine, is applicable and unquestionably met in this case. Specifically, a worker may be found to be totally disabled if by reason of the disability resulting from the Petitioner's injury, he cannot perform work of the general character that he was performing when injured, or any other work which a person of his/her capabilities may be able to do or learn to do. Marshall v. Industrial Commission, 681 P.2d 208 (Utah 1984). Brundage v. IML Freight, Inc., 622, P.2d 790 (1980). Clark v. Interstate Homes, Inc., 604 P.2d 937, 938 (Utah 1979). United Park City Mines Co. v. Prescott, 393 P.2d 800, 801-02 (Utah 1964). Caillet v. Industrial Commission, 58 P.2d 760 (Utah 1936). The Petitioner clearly meets this standard for entitlement.

CONCLUSION/STATEMENT OF RELIEF SOUGHT

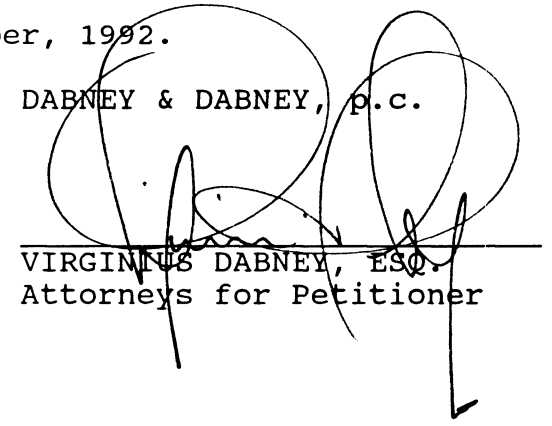
Based upon the foregoing it is respectfully submitted that the Industrial Commission erred when it entered its March 27, 1992 Order dening Mr. Abel's claim for permanent, total disability benefits. He was gainfully employed, working 32 hours a week at a lawful wage at the time of his injury. The uncontroverted evidence submitted to the Industrial Commission supports the finding that he sustained a permanent impairment due to his 1989 industrial accident, and is permanently and totally disabled due to his industrial injury. He was never able to return to work thereafter. Despite his Social Security disability status, he was permitted and able to work. As a result of his industrial injury, he can no

longer work.

Therefore, it is respectfully submitted that this Court remand this case to the Industrial Commission with instructions to award him permanent, total disability benefits.

DATED this 11th day of December, 1992.

DABNEY & DABNEY, p.c.



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PROOF OF SERVICE

I hereby certify that true and correct copies of the foregoing Brief of Petitioner were mailed, postage prepaid, on this 11th day of December, 1992 to the following:

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ADDENDUM

EXHIBIT A: Utah Code Annotated, Section 35-1-67 (1988). Industrial Commission Rule R568-1-17.

EXHIBIT B: Findings of Fact, Conclusions of Law and Order (October 3, 1991).

EXHIBIT C: Order Denying Motion for Review (March 27, 1992).

35-1-67. Permanent total disability -- Amount of payments -- Rehabilitation. (Last amended 1991)

(1) In cases of permanent total disability caused by an industrial accident, the employee shall receive compensation as outlined in this section. Permanent total disability for purposes of this chapter requires a finding by the commission of total disability, as measured by the substance of the sequential decision-making process of the Social Security Administration under Title 20 of the Code of Federal Regulations as revised. The commission shall adopt rules that conform to the substance of the sequential decision-making process of the Social Security Administration under 20 C.F.R. Subsections 404.1520 (b), (c), (d), (e), and (f) (1) and (2), as revised.

(2) For permanent total disability compensation during the initial 312-week entitlement, compensation shall be 66-2/3% of the employee's average weekly wage at the time of the injury, limited as follows:

(a) Compensation per week may not be more than 85% of the state average weekly wage at the time of the injury.

(b) Compensation per week may not be less than the sum of $45 per week, plus $5 for a dependent spouse, plus $5 for each dependent child under the age of 18 years, up to a maximum of four such dependent minor children, but not exceeding the maximum established in Subsection (a) nor exceeding the average weekly wage of the employee at the time of the injury.

(c) After the initial 312 weeks, the minimum weekly compensation rate under Subsection (b) shall be 36% of the current state average weekly wage, rounded to the nearest dollar.

(3) The employer or its insurance carrier is liable for the initial 312 weeks of permanent total disability compensation except as outlined in Section 35-1-69. The employer or its insurance carrier may not be required to pay compensation for any combination of disabilities of any kind, as provided in this section and Sections 35-1-65, 35-1-65.1, 35-1-66, and 35-1-66.1 through 35-1-66.7 in excess of the amount of compensation payable over 312 weeks at the applicable permanent total disability compensation rate under Subsection (2). Any overpayment of this compensation shall be reimbursed to the employer or its insurance carrier by the Employers' Reinsurance Fund and shall be paid out of the Employers' Reinsurance Fund's liability to the employee.

(4) After an employee has received compensation from his employer, its insurance carrier, or the Employers' Reinsurance Fund for any combination of disabilities amounting to 312 weeks of compensation at the applicable permanent total disability compensation rate, the Employers' Reinsurance Fund shall pay all remaining permanent total disability compensation. Employers' Reinsurance Fund payments shall commence immediately after the employer or its insurance carrier has satisfied its liability under Subsection (3) or Section 35-1-69. Notwithstanding the minimum rate established in Subsection (2), the compensation payable by the Employers' Reinsurance Fund shall be reduced, to the extent allowable by law, by the dollar amount of 50% of the Social Security retirement benefits received by the employee during the same period.

(5) A finding by the commission of permanent total disability shall in all cases be tentative and not final until all of the following proceedings have occurred:

(a) Upon tentatively determining that an employee is permanently and totally disabled, the commission shall, unless otherwise agreed by the parties, refer the employee to the Utah State Office of Rehabilitation under the State Board for Vocational Education for rehabilitation training. The commission shall order that an amount be paid out of the Employers' Reinsurance Fund provided for by Subsection 35-1-68 (1), not to exceed $3,000 for use in the rehabilitation and training of the employee.

(b) If the Utah State Office of Rehabilitation under the State Board for Vocational Education certifies to the commission in writing that the employee has fully cooperated with that agency in its efforts to rehabilitate the

employee, and in the opinion of the agency, the employee is not able to be rehabilitated, the commission shall, after notice to the parties, hold a hearing to consider the agency's opinion as well as other evidence regarding rehabilitation. The parties may waive the right to a hearing. If a preponderance of the evidence shows that successful rehabilitation is not possible, the commission shall order that the employee be paid weekly permanent total disability compensation benefits. The period of benefits commences on the date the employee became permanently totally disabled, as determined by the commission based on the facts and evidence, and ends with the death of the employee or when the employee is capable of returning to regular, steady work. In any case where an employee has been rehabilitated or the employee's rehabilitation is possible, but where the employee has some loss of bodily function, the award shall be for permanent partial disability. An employee is not entitled to compensation, unless the employee fully cooperates with any rehabilitation effort under this section.

(6) The loss or permanent and complete loss of the use of both hands, both arms, both feet, both legs, both eyes, or any combination of two such body members constitutes total and permanent disability, to be compensated according to this section. No tentative finding of permanent total disability is required in any such instance. (as last amended by Chapter 12, Laws of Utah 1988 Second Special Session)

R568-1-17. Permanent Total Disability.

A. The Commission is required under Section 35-1-67, U.C.A., to make a finding of total disability as measured by the substance of the sequential decision-making process of the Social Security Administration under Title 20 of the Code of Federal Regulations, as revised. The use of the term "substance of the sequential decision-making process" is deemed to confer some latitude on the Commission in exercising a degree of discretion in making its findings relative to permanent total disability. The Commission does not interpret the code section to eliminate the requirement that a finding by the Commission in permanent and total disability shall in all cases be tentative and not final until rehabilitation training and/or evaluation has been accomplished.

B. In the event that the Social Security Administration or its designee has made, or is in the process of making, a determination of disability under the foregoing process, the Commission may use this information in lieu of instituting the process on its own behalf.

C. In evaluating industrial claims in which the injured worker has qualified for Social Security disability benefits, the Commission will determine if a significant cause of the disability is the claimant's industrial accident or some other unrelated cause or causes.

D. To make a tentative finding of permanent total disability the Commission shall rely upon and be guided by the rules of disability determination published by the Social Security Administration Office of Disability publication SSA Pub. No. 64-014, as amended. In short, the sequential decision making process referred to requires a series of questions and evaluations to be made in sequence. These are:

1. Is the claimant engaged in a substantial gainful activity?
2. Does the claimant have a medically severe impairment?
3. Does the severe impairment meet or equal the listed impairments in Appendix 1 of SSA Pub. No. 64-014?
4. Does the impairment prevent the claimant from doing his or her previous work?

E. After a tentative finding of permanent total disability, the applicant shall be referred to the Utah State Office of Rehabilitation for evaluation and rehabilitation work-up. If the Utah State Office of Rehabilitation determines that the applicant is unable to do any other work because of his age, education, and previous work experience, and as a result of an industrial accident, there shall be a hearing to review the determination of the Utah State Office of Rehabilitation and anv objections thereto, unless the parties waive the right to a hearing.

F. After a hearing, or waiver of the hearing by the parties, the Commission shall issue an order finding or denying permanent total disability based upon the preponderance of the evidence and with due consideration of the vocational factors in combination with the residual functional capacity as detailed in Appendix 2 of SSA Pub. No. 64-014.

KEY: workers' compensation, time, administrative procedure, filing deadlines
1990 **35-1-1 et seq.**
35-2-1 et seq.
35-10-1 et seq.

THE INDUSTRIAL COMMISSION OF UTAH

Case No. 90001099

DARRELL F. ABEL, Applicant, vs. WEST JORDAN CARE CENTER/ WORKERS COMPENSATION FUND OF UTAH and EMPLOYERS REINSURANCE FUND, Defendants.	*	FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER

HEARING: Hearing Room 334, Industrial Commission of Utah, 160 East 300 South, Salt Lake City, Utah, on March 12, 1991 at 10:00 o'clock a.m. Said hearing was pursuant to Order and Notice of the Commission.

BEFORE: Barbara Elicerio, Administrative Law Judge.

APPEARANCES: The applicant was present and was represented by Virginius Dabney, Attorney.

The defendants were represented by Mark Dean, Attorney.

The Employers Reinsurance Fund was represented by Erie Boorman, Administrator.

This case involves a claim for permanent total disability benefits related to a March 22, 1989 industrial back injury. The carrier, the Workers Compensation Fund of Utah, and the Employers Reinsurance Fund have denied liability for permanent total disability benefits, because they argue that the applicant's permanent total disability status is not the result of the March 22, 1989 back injury. They point out that the applicant was found to be disabled by Social Security in 1985, at least 4 years prior to the industrial injury. Therefore, they argue that the applicant's current disability is primarily related to physical impairments that developed prior to the 1989 industrial injury. The applicant argues that he was able to return to work in 1989 not withstanding his significant medical problems and disabilities and that it is the 1989 industrial back injury that has caused him to be currently unable to work at any job. Because all of the applicant's physical impairments had not been rated at the time of the hearing, the matter was was referred to a medical panel to obtain ratings for the applicant's pre-existing, industrial and overall impairment. It was felt that those

ratings would assist in analyzing the cause of the applicant's current disability status. The medical panel report was received at the Commission on September 3, 1991 and was distributed to the parties on September 9, 1991 with 15 days allowed for objections. No objections were filed and thus the matter was considered ready for order on September 24, 1991.

FINDINGS OF FACT:

I. Medical Problems and Work History Pre-dating the Industrial Injury

A. Right Hand Amputation

The applicant had two operations amputating his right hand in 1965. The amputation was necessary as a result of an industrial injury that occurred when the applicant was cleaning out a punch press and the brake on the press gave way. The operations occurred on February 22, 1965 and March 8, 1965 at Providence Hospital in Oakland, California. The only records that are contained in the medical record exhibit (Exhibit A-1) regarding the right hand injury are the two operative reports (Tab A-12, pp. 58-64). The applicant worked for another 20 years following the amputation and per his own testimony, he was able to accommodate the loss of the hand very well.

B. Chronic Obstructive Pulmonary Disease (COPD)

Chronologically, the first mention in the medical record exhibit regarding this problem is the applicant's admission to Valley West Hospital on August 7, 1983 for chest pain (Tab A-11, pp. 53-56). The records for that admission indicate that the applicant was smoking 2 packs of cigarettes per day and had a family history of heart disease. The applicant was coughing and had chest pain that radiated to his neck with numbness radiating down his left arm. Lab studies and an ECG were performed and he was treated with nitroglycerin, oxygen and other medications. The final clinical impression was: 1) chest pain probably due to pericarditis, 2) acute bronchitis and 3) old orthopedic injuries. The next records most likely associated with this problem are diagnostic tests done at Holy Cross Jordan Valley Hospital in January and February of 1985. On January 11, 1985 a chest X-ray was taken and was read to show probable pulmonary fibrosis (Tab A-14, p. 117). An EKG was done on January 18, 1985 (Tab A-14, p. 97-98) and pulmonary function tests were done on February 11, 1985 (Tab A-14, p. 118). Dr. G. Woods did an evaluation of the problem for Disability Determination Services on March 14, 1985 (Tab A-14, p. 120). He notes that the applicant continued to have chest pains after his 1983 hospital admission. Per Dr. Woods, severe pains occurred during and just after coughing spells, with the pains disappearing several minutes after the coughing stopped. There was no chest pain associated with exertion, but shortness of breath occurred with exertion initially and had progressed to occur while the applicant was at rest as well. The shortness of breath was variable per Dr. Woods's report, with some days of shortness of breath while resting and some days where the applicant was able to tolerate

mild exertion. Dr. Woods notes that the applicant was coughing every morning and has been a one-to-three packs-per-day smoker for 33 years. The applicant coughed uncontrollably at intervals during Dr. Woods's examination. Dr. Woods's assessment was: 1) chest wall pain, EKG does not show changes significant for coronary disease, 2) chronic bronchitis, not under optimal medical therapy and smoking 1 pack per day, 3) positive PPD.

The applicant continued to have intermittent hospitalizations for exacerbations of his chronic bronchitis. He was admitted to Holy Cross Jordan Valley Hospital on March 18, 1985 (Tab A-7, pp. 37-38), on March 19, 1986 (Tab A-7, pp. 33-36) and again on January 23, 1987 (Tab A-7, pp. 26-30). The January 1987 admission was complicated by a hypersensitivity reaction to sodium metabisulfite, a common green vegetable preservative, which occurred after the applicant ate some celery. The hospital records indicate that the preservative was known to cause airway obstruction in sensatized individuals. The records for both the March 1986 and the January 1987 admissions note continued heavy smoking. A July 22, 1987 medical report of Dr. K. B. Johnson indicates that the applicant's condition was moderate to severe chronic pulmonary obstructive disease, severe enough to require home use of oxygen (Tab A-14, p. 149). The records contain two additional admissions to Cottonwood Hospital for exacerbations of the applicant's lung condition. These occurred in January of 1988 (Tab A-10, pp. 48-50) and in September of 1988 (Tab 1-10, pp. 45-47). The applicant testified that he smoked for 45 years and that at one point he smoked 3 packs per day. He stated that he currently smokes 1 pack per day.

C. Essential, Familial or Intentional Tremor

Chronologically, the first mention of this tremor in the medical record exhibit is found in a report of Dr. G. Woods dated May 6, 1985 (Tab A-14, p. 106). In that report, Dr. Woods indicates that the applicant's respiratory condition had improved with outpatient therapy, but that the applicant felt he was unable to work due to a resting tremor in his head and hand. Dr. Woods notes that the tremor made tasks involving fine motor coordination difficult and that the tremor had increased as a result of bronchodilator medication the applicant was using. Dr. Woods recommended a neurological consultation regarding the tremor. The applicant was evaluated by Dr. D. Thoen of Western Neurological Associates in Salt Lake City on May 28, 1985 (Tab A-14, pp. 95-96). Dr. Thoen notes that the applicant had had the tremor in his arms for a number of years, with the left being worse than the right. He notes that the tremor had slowly gotten worse. Dr. Thoen found that, as a result of the tremor, the applicant had a very difficult time writing and would have difficulty manipulating small objects. He found that the tremor became more severe when the applicant was agitated or when he was concentrating on doing something. Dr. Thoen concluded that the applicant's respiratory problems precluded use of the only medication that is known to help the problem (Inderol). The applicant testified that this tremor did not prevent him from being a truck driver.

D. Diabetes

The applicant has adult-onset diabetes which he testified was diagnosed 8 years ago. The applicant began treatment for his diabetes in February 1989 at the Family Medical Center in West Jordan, Utah. It is unclear what treatment he had for the diabetes prior to that. The applicant was admitted to St. Mark's Hospital on February 22, 1989 for "diabetes mellitus out of control." Initially, there was consideration of insulin therapy, but the applicant's blood sugar was stabilized by way of diet and medication and he was discharged on February 23, 1989 with the indication that insulin would be avoided at that point. The discharge summary (the only record in the medical records submitted) for that hospitalization indicates that the applicant's diabetes mellitus was poorly controlled due to many factors including, recent upper respiratory infections with bronchitis, lack of diet therapy, prior prednisone use and underlying continued tooth abscesses. The applicant testified at hearing that he controls the diabetes with medication and diet and he is not currently insulin-dependent. The applicant testified that he has some eye problems as a result of the diabetes.

E. Cervical Spine

The first mention in the medical record exhibit regarding treatment for this condition is a Holy Cross Jordan Valley Hospital emergency room visit on September 29, 1986 (Tab A-7, p. 31). The only note on the record for this visit is that the applicant was given a cervical collar for neck pain. A CT scan of the cervical spine was done at Holy Cross Hospital on November 12, 1986 (Tab A-14, p. 150). The scan report indicates that the film was difficult to read due to the applicant's short neck and broad shoulders. There did not appear to be significant stenosis of the bony spinal canal, but the film was read to show some apparent narrowing of the intervertebral foramen on the right of C6-7 and slight narrowing of the intervertebral foramen on the left at C5-6. Dr. K. B. Johnson found that the applicant had diffuse degenerative joint disease, most marked in the cervical spine (Tab A-14, p. 149). The applicant testified that he has headaches sometimes as a result of his neck condition and he indicated that he was given a neck brace at some point by some doctor.

F. Other conditions

The applicant mentioned he had been in an automobile accident in the past and had broken his collar bone, but it is not clear when this occurred and there are no records for the relevant treatment. The applicant stated that he had a water retention problem at one point in the past, but that this resolved itself (no records regarding any treatment for this are included in the medical record exhibit). The applicant had chronic left epididymal orchitis and as a result had a left orchiectomy and vasectomy performed at Cottonwood Hospital by Dr. G. Middleton on November 14, 1985 (Tab A-10, pp. 51-52). The applicant testified that he takes medication for his cholesterol.

G. Work History

The work history provided by way of testimony is fairly general in nature and dates were not provided. The applicant testified that he worked for 20 years as a truck driver, driving dump trucks and 18-wheelers. The applicant worked as a punch press operator in the 1960's and this is when he lost his right hand. Per the Social Security records, the applicant worked as a nurse at th VA Hospital from 1975 through 1980 and then was employed for approximately 2 months in 1980 at West Jordan Care Center taking care of retarded children. From June of 1980 through July of 1984, the applicant drove a delivery truck for Ireco Chemicals. The applicant was also employed as a security guard beginning in December of 1984. The applicant originally applied for social security disability in early 1985 under a primary diagnosis of status post right hand amputation. He was denied on that application and he reapplied with a primary diagnosis of severe familial tremor, left upper extremity and secondary diagnosis of amputation right forearm. The applicant was granted benefits based on that application in 1987 with the benefits beginning as of January of 1985. The applicant was apparently unemployed from 1985 until he got his job with the defendant West Jordan Care Center shortly before his injury in March of 1989.

II. The Industrial Injury and Treatment Following that Injury

The applicant is a male who was 56 years old on the date of injury (March 22, 1989). The applicant had his wife and his wife's son living with him on that date. On the date of injury, the applicant was employed with West Jordan Care Center as a trainer/nurse's aid. In that position, he was earning $3.48 per hour working 32 hours per week. The applicant testified that he had been receiving Social Security Disability benefits for 5 years when he got the job at West Jordan Care Center. The applicant stated that under the Social Security Disability system, a disabled person is allowed to work and earn a certain amount of money. The applicant's wife was working as a trainer and she told the applicant about the job at West Jordan Care Center. The applicant indicated that he did not like being unemployed with nothing to do and thus he decided to take the job. The job involved dressing, feeding and bathing the residents of the Care Center. The applicant attended a orientation meeting in which the new trainers were told what would be expected of them. The applicant testified that he felt that he could do the necessary work.

On the date of injury, the applicant was moving a resident from his wheelchair to his bed. The resident was a mentally retarded adult (18 to 20 years old) named Kelly who weighed between 110 and 115 pounds. The applicant had to get Kelly out of the wheelchair and up onto the bed (which was about 2 feet higher than the seat of the wheelchair). The bed was to the left of the applicant and behind where he was standing. The applicant turned quickly as he lifted Kelly and as he did so, Kelly began to move around. This caused the applicant and Kelly to fall to the floor. The applicant testified that he felt a sharp pain in the low back one or two inches below the belt line and he

also felt pain in his legs for a couple seconds. The applicant managed to get Kelly into the bed, but he recalls that his back hurt as he did this. The applicant stated he turned in an accident report after getting Kelly into bed and he went home. The applicant did not return to work after that because he was unable to lift residents after the injury.

The applicant recalls seeing Dr. R. Davis at the Family Medical Center in West Jordan the day following the injury (March 23, 1989). However, Dr. Davis's records indicate that the applicant was first seen for his industrial back injury on March 24, 1989. The records indicate that medication was prescribed and the applicant received heat and ultrasound therapy on March 24, 1989, March 28, 1989 and March 30, 1989. The applicant had just one heat/ultrasound treatment in April of 1989 (on April 5, 1989), but the applicant was treated at the Family Medical Center for his diabetes and removal of a foreign body in his left hand in April of 1989. In May of 1989, the applicant was given 8 heat/ultrasound treatments at the Center and he was also treated for a leg injury, diabetes, hypertension and knee pain that month. At the Family Medical Center, the applicant saw Dr. R. Davis, Dr. A. Jacoby, Dr. D. Hartmann and Dr. A. Rivera apparently alternately. The applicant testified that he was referred to the Burns Chiropractic Center by Dr. Hartmann in late May of 1989. Lumbar X-rays were taken there on May 23, 1989. It is unclear from the records what treatment, if any, was provided thereafter.

On May 31, 1989, the applicant was referred to Western Neurological Associates for a CT scan of the lumbar spine. The scan was read to show very little facet degeneration with no evidence of disc herniation or fracture. It is unclear what treatment, if any, the applicant got during June of 1989. There are no records for June of 1989 in the Family Medical Center information. In July of 1989, the applicant began again with heat/ultrasound treatments for the low back at the Family Medical Center. He had 13 treatments that month at the Center and he was also seen there for his diabetes. In August of 1989, the applicant had 18 heat/ultrasound treatments for the low back at the Family Medical Center. On August 11, 1989, he was referred for a second CT scan of the lumbar spine. The Holy Cross Jordan Valley Hospital scan was read to show mild degenerative changes without evidence of focal herniated disc disease. From August 15, 1989 through August 24, 1989, the applicant was involved in testing for a functional capacity evaluation at Jordan Valley Physical Therapy Rehabilitation and Sports Medicine. The conclusion reached by the evaluator was that the results were invalid due to loss of the applicant's right hand and the back and leg pain that the applicant was having during the testing. On August 24, 1989, the applicant had an MRI of the lumbar spine done at Utah Neurological Associates, but a report from that MRI is not included in the medical records. On August 31, 1989, Dr. R. Davis wrote the carrier indicating that the applicant had developed lumbar spine dysfunction and myofascitis due to an industrial injury and that he was 80% disabled from his current job and needed retraining.

In September of 1989, the applicant had 16 heat/ultrasound treatments at the Family Medical Center and he was also seen there for his diabetes. On September 25, 1989, the applicant was seen by Dr. E. Spencer at the request of the carrier. Dr. Spencer diagnosed the applicant as having mild degenerative disc disease with hip abductor weakness and referred pain to the lateral thighs and back. Dr. Spencer opined that the applicant had more of a muscle strain than a disc injury and he found that the applicant had 0% impairment resulting from the injury with no future medical care required for the industrial injury. In October of 1989, the applicant received 23 heat/ultrasound treatments at the Family Medical Center and he was also treated there for a upper respiratory tract infection, diabetes, bursitis and otitis. On October 24, 1989, Dr. J. Zahniser of Western Neurological Associates wrote Dr. Jacoby at the Family Medical Center, apparently offering a neurological consultative opinion. Dr. Zahniser read the lumbar CT and the MRI (apparently the one taken on August 24, 1989 at Western Neurological Associates) as normal and he concluded that the applicant had chronic low back pain associated with musculoskeletal abnormality. He states in his report that he agreed with Dr. Davis's myofascitis diagnosis and he found the applicant should seek non-lifting employment. On October 26, 1989, Dr. R. Davis wrote a letter to whom it may concern indicating that the applicant's back was not stabilized and the applicant was not released to return to work.

In November of 1989, the applicant got 16 heat/ultrasound treatments to the low back at the Family Medical Center and he was also treated there that month for asthma, pneumonia, diabetes and otitis. On November 16, 1989, Dr. Davis completed a summary of medical record form indicating that the applicant had a 15-20% permanent impairment to the low back with none of it pre-existing the March 22, 1989 industrial injury. The applicant continued with his heat/ultrasound treatments from December 1989 through April of 1990, getting approximately 20 treatments per month during that time period. The applicant was also treated at the Family Medical Center for renal insufficiency, high cholesterol, diabetes, upper respiratory tract infections, insomnia, urinary tract infections, bronchitis and prostatitis during the December 1989 through April of 1990 time period.

In May and June of 1990, the applicant cut back his heat/ultrasound treatments to 11-12 treatments per month. From July of 1990 through October of 1990, the treatments again were around 20 per month. The applicant was seen regularly at the Family Medical Center for his diabetes and he was seen episodically for urinary tract infection, prostatitis, cholecystitis, asthma, chronic obstructive pulmonary disease and upper respiratory tract infection. In November of 1990, he began regular treatment at the Family Medical Center for hypertension. Beginning in December 1990, the applicant cut back his heat/ultrasound treatments to around 10 per month and this continued through March of 1991. Although the number of visits for heat/ultrasound after March of 1991 are difficult to assess, the applicant continued with these treatments fairly regularly.

In March of 1991, the applicant was seen by Alan Heal regarding rehabilitation. When interviewed, the applicant indicated that he had constant low back pain with frequent right leg pain to the foot. The applicant indicated to the evaluator the he believed that his condition would not improve. The applicant indicated that he could sit for one hour and that standing and sitting cause his legs to go numb. The report indicates that the applicant's shortness of breath caused him to be unable to be in certain environments, that his diabetes caused problems for him reading and that his hand tremor caused writing to be difficult. Alan Heal concluded that the applicant could do some kind of work, but was not fit for competitive gainful employment. In March of 1991, both Dr. R. Davis and Dr. A. Rivera of the Family Medical Center provided letters indicating that the applicant was disabled due to his back and a number of other medical problems. Dr. Davis opined that the applicant had a 15-20% disability due to the lumbar condition alone.

At hearing, the applicant indicated that he still had constant low back pain and stiffness that was worse at times. He stated that his legs go numb to the knee at times and go out from under him. The applicant stated that he still took soma and oxycodeine and that he could not sit or stand for long. The applicant stated that he uses a cane to walk and that he did have some back braces that he used just after the date of injury. He indicated that future surgery is not recommended for him due to his lung condition. The applicant stated that he considers his back to be his most serious medical problem. The applicant stated that this is because he was able to work (at West Jordan Care Center) with his other medical problems, but could not work after the March 22, 1989 industrial injury. The applicant considers his diabetes to be the second most serious problem employment-wise, because it prevents him from being a truck driver or a chauffeur and prevents him from being able to do the charting that is necessary for nursing. The third most disabling condition the applicant finds is his chronic obstructive pulmonary disease which he finds prevents him from moving around in a hurry for a long time. The applicant feels he can do none of the prior jobs that he has had and he stated that currently he is not very active. He stated that when he spoke with Rehabilitation (apparently the State Office of Education) they told him that because of his age, it would take too long to retrain him to do light work.

The appointed medical panel consisted of Chairman, Dr. M. Thomas, a neurologist and Dr. B. Holbrook, an orthopedist. The panel was asked to rate the applicant's numerous medical conditions. The panel rated as follows:

MEDICAL PROBLEM	WHOLE PERSON IMPAIRMENT
right hand amputation at the wrist	57%
chronic obstructive pulmonary disease (COPD)	50%

essential or familial tremor	5%
diabetes	5%
cervical spine	6%
low back	5%
thoracic spine	2%
orchidectomy	5%
right clavicle	2%
cardiac	15%
meralgia paresthetica	2%

The panel found that only the low back impairment (5%) was attributable to the March 22, 1989 industrial accident. Combining all the percentages, in the manner that is required by the AMA Guides to the Evaluation of Permanent Impairment, the panel arrived at a total combined impairment of 80% of the whole person.

CONCLUSIONS OF LAW:

There is no question that the applicant is permanently totally disabled. The applicant meets the Social Security guidelines for total disability, which guidelines have been adopted in Utah by statute (U.C.A. 35-1-67) and by rule (R490-1-17) for the purpose of analizing permanent total disability workers compensation claims. The issue to be resolved in this case is whether the permanent total disability was caused by the March 22, 1989 industrial accident. If so, the applicant is entitled to an award of permanent total disability benefits, if not, his permanent total disability claim must be dismissed (R490-1-17 (C) and Large v. Industrial Commission, 758 P.2d 954 (Utah App. 1988).

In analizing the cause of the applicant's permanent total disability, the applicant argues that his low back condition is the medical problem that most effects his employability. He points out that he was able to work as a trainer/aid at the care center prior to his back injury, and now, because of his low back symptoms, is unable to do that job. He argues that he was able to work at the care center with over 75% whole person impairment and so that pre-existing impairment cannot be considered the cause of his disability. Rather, he points to the March 22, 1989 back injury as the "final straw" which made him unable to return to any kind of work. The ALJ finds the applicant's argument logical and not without merit. However, the ALJ finds that the arguments for no causal connection between the industrial injury and the permanent total disability are also very compelling.

The applicant was determined to be permanently totally disabled by Social Security as of Jaunaury 1985. As noted above, the same criteria used by Social Security in making a finding of total disability is now used by the Industrial Commission in determining whether an applicant is permanently totally disabled for purposes of workers compensation. Therefore, per Industrial Commission statute and rule, the applicant qualified as permanently totally disabled in January 1985, 4 years prior to when he had the industrial accident at issue (March 22, 1989). If the industrial accident occurred after the applicant was already determined to be permanently totally disabled, then it is very difficult to say that the March 22, 1989 industrial accident CAUSED the permanent total disability.

Besides looking at the sequence of events, the ALJ finds that it is also advisable to review the applicant's disabilities and the causes of those disabilities. In doing so, the ALJ notes that the applicant's most serious employment disabilities do not necessarily correspond to the permanent impairments that carry the highest percentage rating. For example, the right hand amputation was not a serious employment disability for the applicant, in and of itself, even though it rates 57% whole person. The applicant worked productively for many years when this was his only major impairment. However, when this impairment was combined with the development of the chronic obstructive pulmonary disease in 1983 and the familial tremor in 1985, the applicant's employment disabilities became significant. The applicant was precluded from employment that was exertional in nature, as well as from any sedentary work that required fine motor skills, and it was at this point that Social Security found the applicant totally disabled.

Currently, the applicant states that he feels his back problems are the major cause of his inability to work, but the ALJ finds that the evidence does not support this feeling. The applicant's back has not been operated on and there have been no significant radiological findings which would suggest that any acute injury to the back occurred on March 22, 1989. The panel feels that the back has very minimal impairment and that the physical therapy passive modalities that the applicant has received for the back over a period of several years are probably not necessary. The applicant has indicated that he has many symptoms that <u>can</u> be associated with low back injury, like numbness in the legs and inability to sit or stand long, but it is not clear that all these symptoms are related to the industrial accident. The panel indicates that the applicant's leg numbness is a separate condition known as meralgia paresthetica and that this condition is not related to the industrial accident. It simply is not clear whether the limited sitting and/or standing are due to the leg numbness or result due to the industrial accident. However, even if one concedes that the industrial accident caused some limitation to the applicant's ability to sit and stand over long periods, he should still be able to do some kinds of light or sedentary work. What prevents him from doing this kind of work is his pre-existing impairments and their associated disabilities (inability to do sedentary manual work due to no right hand and the familial tremor that effects the left hand, impaired eyesight due to the diabetes and the factors of age and lack of training/education).

In light of the foregoing discussion, the ALJ finds that the applicant did have a compensable work injury on March 22, 1989 and he is therefore entitled to workers compensation benefits associated with the low back injury that resulted due to the accident. Based on the evidence currently before the ALJ, this would include medical expenses and permanent impairment benefits for a 5% whole person low back impairment. However, it does not include permanent total disability benefits. The applicant's current unemployable status is not the result of the March 22, 1989 accident. Although the March 22, 1989 industrial accident may have minimally contributed to the applicant's already substantial disabilities, that accident did not cause him to go from employable to unemployable. The applicant was basically unemployable on March 22, 1989. Although he was able to work on a very limited basis (part time) at that time, for very minimal wages ($3.42/hour), he was not capable of gainful employment due to his significant pre-existing disabilities. The applicant did not enter the job market, only to be taken out again by the industrial accident. Even the applicant stated that he took the job at West Jordan Care Center, not as an attempt to return to gainful employment, but rather as a way of becoming more useful and active. The applicant should be commended for his decision to work at the care center helping other disabled persons. However, the fact remains that he was out of the job market when he began work there, he was incapable of gainful employment at that time, and he was permanently totally disabled as is evidenced by his 1985 Social Security Disability award. The March 22, 1989 industrial accident did not cause the permanent ,total disability. The disability was evident even before the applicant began work with the care center.

Although the applicant is NOT entitled to an award of permanent total disability benefits, he is entitled to medical expenses and permanent impairment benefits as noted above. The carrier has already paid a significant amount in in medical expenses related to the treatment of the applicant's low back, and it is not clear whether outstanding expenses exist. As this issue was not raised at the hearing, the ALJ will presume that there are no denied medical billings at this time. If medical expenses are at issue now or become an issue in the future, the applicant can file a separate application for hearing regarding medical expenses. Based on the Commission file, the carrier has not paid any permanent impairment benefits. The panel found that the applicant has a 5% whole person permanent impairment due to the March 22, 1989 industrial accident, and thus the carrier should pay 15.6 weeks of benefits at $85.00 per week (average weekly wage of $111.36 x .667 = $74.28 + $10.00 for 2 dependents = $85.00 when rounded off as required by U.C.A. 35-1-75), or a total of $1,326.00. Attorney fees are figured per R490-1-7 at 20% of this amount or $265.20.

ORDER:

IT IS THEREFORE ORDERED that the applicant's claim for permanent total disability benefits associated with the March 22, 1989 industrial accident is dismissed with prejudice based on failure to establish the requisite causal connection between the industrial accident and the permanent total disability.

IT IS FURTHER ORDERED that the defendants, West Jordan Care Center and/or Workers Compensation Fund of Utah, pay the applicant, permanent partial impairment benefits at rate of $85.00 per week, for 15.6 weeks, or a total of $1,326.00, for the 5% whole person low back impairment sustained as a result of the March 22, 1989 industrial accident. That amount is accrued and due and payable in a lump sum, plus interest at 8% per annum, per U.C.A. 35-1-78, and less the attorney fees to be awarded below.

IT IS FURTHER ORDERED that the defendants, West Jordan Care Center and/or Workers Compensation Fund of Utah, pay all medical expenses incurred as the result of the March 22, 1989 industrial injury, said expenses to be paid in accordance with the Medical and Surgical Fee Schedule of this Commission.

IT IS FURTHER ORDERED that the defendants, West Jordan Care Center and/or Workers Compensation Fund of Utah, pay Virginius Dabney, attorney for the applicant, the sum of $265.20, as attorney's fees in this matter, said amount to be deducted from the accrued aforesaid award of the applicant.

IT IS FURTHER ORDERED that any Motion for Review of the foregoing shall be filed in writing within thirty (30) days of the date hereof, specifying in detail the particular errors and objections, and, unless so filed, this Order shall be final and not subject to review or appeal.

Barbara Elicerio
Administrative Law Judge

Certified by the Industrial Commission
of Utah, Salt Lake City, Utah, this

3rd day of October, 1991.
ATTEST:

Patricia O. Ashby
Commission Secretary

THE INDUSTRIAL COMMISSION OF UTAH

CASE NO. 90001099

DARRELL F. ABEL,	*	
	*	
Applicant,	*	ORDER DENYING
vs.	*	MOTION FOR REVIEW
	*	
	*	
WEST JORDAN CARE CENTER,	*	
(employer), WORKERS COMPENSATION	*	
FUND OF UTAH, and EMPLOYERS'	*	
REINSURANCE FUND,	*	
	*	
Defendants.	*	

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The Industrial Commission of Utah (IC) reviews the Motion for Review of applicant which was received on November 4, 1991 in the above captioned matter, pursuant to Utah Code Annotated, Section 35-1-82.53 and Section 63-46b-12.

The applicant was previously found to be totally disabled by the Social Security Administration in 1985, and has been receiving Social Security related disability benefits. After having worked for several weeks at a part time job for minimal wages in a nursing home on March 22, 1989, applicant injured his back, and now claims that he should receive Utah Workers Compensation benefits for the incremental loss of the wages he was earning at the time of his injury. Applicant's Motion for Review, at 3.

After a hearing, and after a medical panel had reviewed applicant's case, the administrative law judge (ALJ) found that the applicant had a compensable work injury on March 22, 1989, and that applicant was entitled to medical expenses, and permanent impairment benefits for a five percent impairment to the low back. However, she found that the applicant was not entitled to an award of permanent total disability benefits since the applicant was "basically unemployable on March 22, 1989" by virtue of his significant preexisting disabilities. Order, ALJ, at 11.

The medical panel rated the following percentages of whole man impairment for the applicant's preexisting conditions: (1) Amputation of the right hand in 1965- 57%; (2) pulmonary disease- 50%; (3) tremor- 5%; (4) diabetes- 5%; (5) cervical spine- 6%; (6) thoracic spine- 2%; (7) esophagus- 0%; (8) hypertension- 0%; (9) orchidectormy- 5%; (10) right clavicle- 2%; (11) cardiac- 15%; and (12) meralgia paresthetica, bilateral- 2%. Report, Medical Panel at 8. The medical panel determined that the March 22, 1989 industrial injury did not medically aggravate a preexisting impaired condition of the applicant. Report, Medical Panel at 9.

With regard to the compensable low back injury on March 22, 1989, among others, the panel determined that infrequent consultation would be required, and that emphasis should be placed on a weight reduction program. Id.

The applicant contends that the ALJ erred by interpreting the rules in such a manner that public policy was violated. That is, the Workers' Compensation Act should not be construed in such a way as to discourage seriously injured workers from attempting to return to work. Applicant's Motion for Review, at 3. We do not believe that the benefits awarded by the ALJ in this case diminished the noble aim of returning injured workers to the workplace. In this case applicant was awarded his medical expenses, and a permanent partial disability of five percent.

In this case, applicant had already been found to be totally disabled by the Social Security Administration before his most recent injury. U.C.A. Section 35-1-67 (1953 as amended in 1988) required the IC to adopt rules with regard to permanent total disability that conform to the substance of the sequential decision-making process of the Social Security Administration under 20 C.F.R. The IC promulgated such rules in 1990 under R490-1-17.

Since the Social Security Administration determined that the applicant was permanently and totally disabled in 1985, we can use this information and are not required to reinstitute the process. Id. at B. We are also obligated to determine if a significant cause of the disability was the applicant's industrial accident or some other unrelated cause or causes. Id. at C.

In applying U.C.A. Section 35-1-67, the rules implementing this statute state that the Commission "is deemed to [possess] some latitude ... in exercising a degree of discretion in making its findings relative to permanent total disability." R490-1-17A (Utah Admin. Rules 1991). We determine that since applicant had already been determined to be permanently and totally disabled, his current injury could not, and was not, a significant cause of his permanent and total disability.

We therefore agree with the ALJ that the applicant's industrial accident was not a significant cause of his permanent total disability.

We further decide that the Findings of Fact, Conclusions of Law, and Order of the ALJ were correct in law and fact, and are supported by substantial evidence in light of the whole record.

ORDER:

IT IS ORDERED that the order of the administrative law judge dated October 3, 1991 is affirmed.

IT IS FURTHER ORDERED that any appeal shall be to the Utah Court of Appeals within 30 days of the date hereof, pursuant to Utah Code Annotated, Sections 35-1-82.53(2), 35-1-86, and 63-46b-16. The requesting party shall bear all costs to prepare a transcript of the hearing for appeals purposes.

Stephen M. Hadley
Chairman

Thomas R. Carlson
Commissioner

Certified this 27th day of March, 1992.

ATTEST:
Patricia O. Ashby
Commission Secretary

CERTIFICATE OF SERVICE

I certify that I did mail by prepaid first class postage the Order Denying Motion for Review on Darrell Abel, Case No. 90001099 on 27 March 1992 to the following:

Darrell Abel
8155 S 1700 W #128
West Jordan UT 84088

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ERF

BENJAMIN A. SIMS